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CASE NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1985

RONALD A.BRUNER,)

PETITIONER

VS.) ON PETITION FOR WRIT OF CERTIORARI

ALICE J. PARKER, TO THE SUPREME COURT OF MISSOURI

RESPONDENT)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether or not the common law tort action of seduction as applied in the State of Missouri is gender discriminatory and therefore, in violation of Petitioner's constitutional rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING BELOW

The only parties to the proceedings in the Courts of Missouri, including the Supreme Court of Missouri, were Petitioner, Ronald A. Bruner, and Respondent, Alice J. Parker. This is the first application by either party to this Court which has been sought for relief.

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CITATION TO OPINION BELOW

The judgment and opinion of the Supreme Court of Missouri appear at page 4. of the appendix to this petition, and are reported at 683 S.W. 2d 265 (Mo. banc 1985). The judgment and opinion of the Court of Appeals of Missouri in this case are unreported at this time. Copies of the majority opinion, the concurring opinion and the dissenting opinion filed by the Court of Appeals of Missouri appear at page 17. of the appendix to this petition.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Petition of Writ of Certiorari pursuant to 28 U.S.C. §1257.

The judgment of the Court of Appeals of Missouri in this case was entered on July 19, 1984. Under certification by the dissenting opinion of the Chief judge of the Court of Appeals, the case was transferred to the Supreme Court of Missouri, and after additional briefs and oral arguments, that Court by opinion entered January 15, 1985, retransferred the case back to the Court of Appeals of Missouri. Petitioner filed a Motion to Rehear and Application to Transfer the case to the Supreme

Court of Missouri in the Court of Appeals of Missouri pursuant to that Court's rules and said Motion to Rehear and Transfer Case was denied on March 5, 1985. (See appendix, page 1.). An application to transfer and rehear was then filed in the Supreme Court of Missouri in accordance with that Court's rules and said application was denied on April 2, 1985.

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the due process clause of the Fifth Amendment to the Constitution of the United States which provides in pertinent part:

> "No person shall...be deprived of life, liberty, or property, without due process of law..."

2. This case also involves the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> "...Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE [1].

The litigation involved in this case arose at

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1. References to "Tr." refer to the trial transcript.

the conclusion of a long-term romantic and sexual relationship between these parties which began in the fall of 1979, (Tr. 216, 98) and continued until January, 1981, when Respondent became pregnant for the first time. (Tr. 164, 225). Respondent terminated that pregnancy by abortion and the relationship between the parties continued thereafter until the Respondent again became pregnant in March, 1982. (Tr. 18). The second pregnancy of Respondent continued uninterrupted to the birth of the parties' child, Christopher Parker, on November 5, 1982. (Tr. 122-123).

Ronald A. Bruner, hereinafter referred to as Petitioner, and Alice J. Parker, hereinafter referred to as Respondent, met at a swimming pool at an apartment complex where Petitioner resided in Caruthersville, Missouri. (Tr. 134-136). The Petitioner and the Respondent began their relationship on the day of their first meeting which was in August, 1979. (Tr. 96-97).

When Petitioner and Respondent met, Petitioner was thirty-four years of age (Tr. 96), a dentist by profession (Tr.209), and lived and worked in Caruthersville, Missouri. (Tr. 212).

The Respondent was twenty-three years of age and a nursing student attending Murray State University. (Tr. 94-96). Respondent subsequently graduated from Murray State University with a Bachelor of Science degree in Nursing and a Health Education major in May of 1980. (Tr. 95). Respondent had a total of six years of college education, beginning in the fall of 1974 and continuing until May of 1980 (Tr. 95), and she subsequently was employed as a registered nurse at Parkview Hospital, Dyersburg, Tennessee (Tr. 106), Baptist Memorial Hospital, Memphis, Tennessee (Tr. 122), and at the time of the trial, was working at Pemiscot County Memorial Hospital as a nursing relief supervisor. (Tr. 96). The Respondent also had been employed as a teacher at Pemiscot County Vocational School where she taught a course called "Health Occupations." (Tr. 106). At the time of the trial, Respondent was twenty-seven years of age. (Tr. 94).

After the first date in August, 1979, Petitioner and Respondent dated one another normally every weekend. (Tr. 97-98). The Respondent testified that the relationship, "became very close very soon and that she fell in love with the Petitioner."(Tr.98)

The Respondent further testified that the parties first had sexual intercourse during the following November of 1979, (Tr. 98) although she admitted spending the night with the Petitioner in a room in the Sheraton Hotel in Memphis, Tennessee, prior to that time (Tr. 144) in September (Tr. 148) and a second time in October at a village resort at the Kentucky Dam. (Tr. 148-149).

Both the Petitioner and the Respondent testified that the first act of sexual intercourse occurred between the parties some time between September, 1979 (Tr. 216) and November, 1979. (Tr. 98). The Respondent testified that the Petitioner never actually offered or promised to marry her (Tr. 100, 161, 218), although, "he told me that he loved me. He talked about our life together. We talked about the things that we wanted. He would say, '"When we get married"', and he would use a term of that sort. He never said, '"Will you marry me?'", or '"I want to marry you."', he didn't use those exact terms, but, he did lead me to believe that with wording of his choice." (Tr. 99-100). The Respondent further testified that she did not know why she consented to sexual intercourse with the

Petitioner and stated, "I don't know, it seemed like it just, after all that time and all that fighting. I am not sure exactly how it happened, I just know it happened, and I, and I know that I, that I loved him and I know that I believed that he loved me and I know that I felt that we were going to have a life together, otherwise I wouldn't of." (Tr. 101). The Respondent and Petitioner discussed marriage in general and in varying terms at different times in their relationship but the actual words of proposal of marriage were never expressed until after the Respondent became pregnant in January of 1981. (Tr. 161). The Respondent testified that when she was asked when the Petitioner had discussed marriage with her, that she was unable to indicate with any certainty as to when those discussions had taken place. (Tr. 162). However, the Petitioner testified that during the discussions regarding marriage, prior to the first act of intercourse were, initiated by the Respondent, and that he would tell her, "Alice, you know how I feel about that now, I have told you how I feel about it, I'm a little, '"shall

we say, gun shy..."'." (Tr. 25).

After the first act of intercourse, the Respondent and the Petitioner spent almost every weekend together and they engaged in sexual relations regularly. (Tr. 103-104). They took many trips to such places as St. Louis, Missouri, Memphis, Tennessee, (Tr. 50-51), Miami, Florida (Tr. 103), and frequently stayed at the Hyatt Regency Hotel and the Peabody Hotel in Memphis, Tennessee. (Tr. 103-104). Respondent testified that, after the first act of intercourse, she "felt married". "I knew that I wasn't married, but I felt married because I had already set my mind that I was going to wait on that person." (Tr. 163). After the Respondent became pregnant the first time in January, 1981, (Tr. 164, 225), the parties decided to get married and went to St. Louis where they purchased a ring and a marriage license. (Tr. 165). Petitioner and Respondent were going to enter into a pre-nuptial contract prior to their marriage; however, they changed their minds after seeking various legal advice. (Tr. 164,165,227). The Petitioner was reluctant to marry the Respondent (Tr. 226-227), and the engagement between the parties

lasted approximately three days (Tr. 166,227) and terminated when the Petitioner told the Respondent, "Alice, I can't, I just can't go through with it, I can't marry a woman I don't love." (Tr. 227). Respondent then decided to have an abortion. (Tr. 111).

After the termination of the engagement and the abortion, the Petitioner and the Respondent continued to see one another and continued to have sexual relations. (Tr. 115). They continued to make weekend trips together to various resorts and hotels throughout 1981 and until March, 1982. (Tr. 115). Further, the Respondent was aware that Petitioner was seeing other women during this period from 1981 through 1982. (Tr. 234). Also, the Petitioner continued throughout this period of time to express his reservations about marriage to Respondent. (Tr. 116).

The Respondent began using birth control pills in September of 1981, which was approximately the same time that the parties again contemplated marriage and saw an attorney about a pre-nuptial agreement. (Tr. 231). The attorney informed the parties that the pre-nuptial agreement would not be effective. (Tr. 116). Although Petitioner thought that Respondent was still taking birth

control pills (Tr. 237), she discontinued taking birth control pills after approximately one week. (Tr. 173). Respondent then became pregnant for the second time in February of 1982 and informed the Petitioner of her pregnancy in March of 1982 whereupon the Petitioner told her that he would not marry her and Respondent told the Petitioner that he must marry her or she would take him for everything he had. (Tr. 38).

The parties'relationship ended at that time except for several attempts by Respondent to call Petitioner and, on one occasion, Respondent's writing a note to the Petitioner with lipstick on his garage door. (Tr. 239).

The Respondent's pregnancy was carried full term to delivery of a son on November 15, 1982. Petitioner denied paternity at that time and continued to deny paternity until after the return of blood tests shortly prior to trial. (Tr. 22).

The litigation between the parties began by Respondent's filing a Petition to Establish Paternity on June 3, 1982. (Legal File, 47-48). The Petitioner filed his answer in the form of a general denial in July of 1982 and Respondent filed

an amended two-count petition, count two of which alleged seduction by false promise of marriage. (Legal File, 42-44). The Petitioner answered with a general denial of seduction. On March 16, 1983 Petitioner filed an amended answer admitting paternity of the child and accepting financial responsibility for the support and maintenance of the child, as well as pre-natal care and expenses. (Legal File 28-29). Respondent dismissed count one of the petition, alleging paternity, and the case proceeded to trial only upon count two dealing with the issue of common law action of seduction.

The trial of this case proceeded before a jury which found for Respondent and assessed damages at Twenty-five Thousand Dollars ($25,000) actual damages and Fifty Thousand Dollars ($50,000) punitive damages for a total of Seventy-five Thousand Dollars ($75,000), (Legal File 12) and an order was entered by the Court approving the verdict of the jury on March 21, 1983. Petitioner timely filed his Motion for a new trial wherein he alleged that the common law cause of action of seduction as defined and applied in the Courts of Missouri was unconstitutionally discriminatory

under the Fourteenth Amendment to the Constitution of the United States because it was a denial of equal protection for the cause of action to lie for females, and by legal definition in Missouri, not be applicable for males. (Legal File 10). The Motion for New Trial was denied by the trial court. (Legal File 3).

Petitioner filed his appeal to the Court of Appeals of Missouri, Southern District, which Court affirmed the trial court's judgment (Appendix page 17.), and the case was certified to the Missouri Supreme Court by the dissenting Chief Judge of the Missouri Court of Appeals. The constitutional issues of denial of due process of law and equal protection of the law were presented to the Court of Appeals of Missouri and again presented to the Missouri Supreme Court. The Missouri Supreme Court issued an opinion which did not address the constitutional issues presented and pursuant to the Missouri Supreme Court's opinion, the case was ordered retransferred back to the Missouri Court of Appeals because the Missouri

Supreme Court determined that the case had been improperly transferred by the Missouri Court of Appeals to the Missouri Supreme Court. The constitutional issues were then re-presented to the Missouri Court of Appeals by Petitioner in his Application to Rehear or Transfer; however, that Court by its opinion, denied said motion (Appendix page 1.). Petitioner then filed an Application to Transfer and Rehear the Case in the Missouri Supreme Court and that Court issued its final order denying the relief requested. (Appendix page 2.).

ARGUMENT

A. APPLICABLE LAW

The common law cause of action of seduction in the State of Missouri was judicially created, and its elements are as stated in Breece v. Jett, 556 S.W. 2d 696, 707 (Mo. App. 1977), as follows:

> 1. The action in this, unlike other states, is based upon common law and is not a statutory action.
> 2. Today, unlike the common law, the woman, whether a minor or an adult, may maintain the action in her own name provided that she is unmarried at the time of the seduction... she may be a divorced woman;
> 3. The conduct of the defendant must consist of such solicitations importunities, misrepresentations, knowlingly false pro-

mises or artificies, including a false promise to marry for the purpose of seduction, which led the Plaintiff, a chaste, unmarried woman, to deviate from the path of rectitude;
4. The deviation must occur because of the false solicitations, importunities, false promises or false promise to marry;
5. The Plaintiff, having a right to rely upon such promises or artificies;
6. Relying on such false promises or artifices, Plaintiff consented to unlawful sexual intercourse; and,
7. The action is a species of fraud and the evidence to support a judgment must be clear, cogent and convincing. Breece v. Jett, 556 S.W. 2d 696, 707 (Mo. App. 1977).

While no more recent Missouri Supreme Court opinions dealing with this cause of action have been found, the Missouri Court of Appeals, in Greco v. Anderson, 615 S.W. 2d 429 (Mo. App. 1980), cited the Breece holding with approval.

The action of seduction as defined by the Missouri common law is, thus, gender discriminatory. The Breece Court's element No. 3, supra, 556 S. W. 2d at 707, states that only a woman may be a plaintiff in bringing this cause of action. All males are thus barred from doing so no matter what the circumstances. Thus, being gender discriminatory on its face, the cause of action of seduction must fall unless it can withstand constitutional scrutiny. This Court has

recently held "The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." Mississippi University For Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L. Ed. 2d 1090 (1982), citing Kirchberg v. Feenstra, 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed. 2d 428 (1981); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed. 2d 870 (1979).

This Court in Mississippi University then went on to state that "the burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'." Mississippi University For Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed. 107 (1982) citing Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed. 2d 107 (1980).

The Missouri Court of Appeals, in Breece vs. Jett, supra, addressed the same objectives when it stated:

> "The woman of today is not the woman of yesteryear. She has a new-found freedom. The modern adult woman is sophisticated and mature. The former notion that women belong to the weaker sex has long been abandoned. The modern woman is not 'easily beguiled' and does not easily fall to the 'wiles of men'. Women desire and should be held to a reasonable responsibility...We believe that an action for seduction is socially unwise in a modern society...The arsenal of judicially created remedies has, in modern times, been abolished by legislatures of several states for a multitude of reasons.[2] Recent social trends and the changing mores of contemporary society concerning sex and morality and the new-found status of women will make the action of seduction a remedy of a by-gone era. In many states civil actions for sexual involvement have been abolished by the so-called 'heart balm statutes'. There has come to be a realization today that actions of this kind have failed to accomplish their original social purpose and are considered by many jurisdictions to be socially unwise. Such actions are subject to great abuses, causing embarrassment, humiliation, and damage to persons who may be wholly innocent, perhaps such actions afford a fertile field for blackmail and extortion. Breece v. Jett, 556 S.W. 2d 696, 707-708.

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[2]. Seventeen states have legislatively abolished seduction as a cause of action. In these jurisdictions, a female who has reached her majority, is emancipated, and who suffers from no incapa-

In accord with the Breece Court, Prosser, Law of Torts, 4th Ed., pp. 885-888, states:

> "Those actions for interference with domestic relations which carry an accusation of sexual misbehavior--that is to say, criminal conversation, seduction, and to some extent alienation of affections--have been peculiarly susceptible to abuse. Together with the action for breach of promise to marry, it is notorious that they have afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement. There is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives; that it is impossible to compensate for such damage with what has derisively been called 'heart-balm'; that people of any decent instincts do not bring an action which merely adds to the family disgrace; and that no preventive purpose is served, since such torts are seldom committed with deliberate plans. Prosser, Law of Torts, at 887.

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city can no longer bring suit against a male for this tort. The abolishing states and the applicable statutes are: Alabama, Ala. Code 1975, §6-5-331; California, West's Ann. Cal. Civ. Code §43.5; Colorado, Colo.Rev.Stat. 1973, 13-20-2-2; Delaware, 10 Del. Code §3924; Florida, West's Fla.Stat.Ann. §771.01; Indiana, West's Ind. Code 34-4-4-1; Michigan, Mich, Comp. Laws Ann. §27A. 2901; Minnesota, Minn. Stat.Ann. §553.01; Montana, Mont. Rev. Code 1947, §17-1201; New Jersey, N.J. Stat. Ann. 2A: 23-1; New York, McKinney's Civ. Rights law §80a; Ohio, Ohio Rev. Code §2305. 29; Oklahoma, 76 Okl. Stat. Ann. §8.1; Vermont, 15 Vt. Stat. Ann. §1001; Virginia, Va. Code 1950, §8.01-22-; Wyoming, Wyo. Stat. 1977, §1-101.

Numerous states have by legislative action abolished the cause of action of seduction and related torts.[3] Several statutes have included statements similar to those of the Minnesota Statute:

> Minnesota Statute Ann. §553.01. Breach of promise; alienation of affections; criminal conversation and seduction; declaration of policy.
>
> Actions based upon alleged alienation of affection, criminal conversation, seduction and breach of contract to marry have been subject to grave abuses, have caused intimidation and harassment, to innocent persons and have resulted in the perpetration of frauds. It is declared as the public policy of the state that the best interest of the people of the state will be abolished by the abolition of these causes of action.

There has been express recognition by many states' legislatures of the discriminatory effects of the cause of action. And, in the State of Missouri, the Breece Court, supra, at 708, noted both the gender discriminatory nature and effects of the cause of action. The states wherein the cause of action has

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[3] Breach of promise to marry, a sister-tort of seduction, has been legislatively eliminated as a cause of action in the following eight jurisdictions: Connecticut, Conn. Gen. Stat.Ann. §52-57 2b; District of Columbia, D.C. Code 1981, §16-923; Maryland, Ann.Code of Md. FL 3-102;

been legislatively abolished have, explicitly or implicitly, recognized that the societal objectives hoped to be protected by the cause of action were either wrong, or not obtained by such causes of action, or were less substantial than the harms caused by allowing the maintenance of such causes of action.

Thus, when examined under the requirements of the equal protection clause, the gender classification of the cause of action of seduction cannot be said to serve any important governmental objective; nor can it be said to be substantially related to the achievement of those objectives.

This Court has stated:

> "Legislative classification which distributes benefit and burdens on the basis of gender carry the inherent risk of reinforcing the stereotype about the 'proper place' of women and their need for protection. Thus, statutes proportionately designed to compensate and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender neutral classification as by one that gender classifies, and therefore carries with it the baggage of sexual stereotype, the State

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Massachusetts, Mass. Gen. Laws Ann. §207-47 A; Nevada, Nev. Rev. Stat. Ann. §171; Pennsylvania, 48 Pa. Code Stat. Ann. §171; West Virginia, W. Va. Code 56-3-2a; Wisconsin, Wis, Stat. Ann.§768.01.

cannot be permitted to classify on the basis of sex." Orr v. Orr, 99 S. Ct. 1102, 1113-1114, 440 U.S. 268, 59 L.Ed. 2d 306 (1979).

And, in Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed. 2d 1090 (1982) this Court went on to say:

> "Although the test for determining the validity of a gender-based classification is straight forward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. Mississippi University for Women v. Hogan, 458 U.S. 718, 724-725.

Here, in this case, where the case involves a judicially created common law action rather than being legislatively created, the rules of scrutinizing for constitutionally defective discrimination should be the same.

Petitioner accepts that the state has as a legitimate objective the societal values, mores and conduct of its citizens. Also, Petitioner accepts that the state has a legitimate objective in the prevention of illegitimate births. However, Petitioner contends that other, gender-

neutral, means are presently available for the achievement of those objectives. And, Petitioner contends that the gender-discriminatory cause of action of seduction is, therefore, redundant, has great potential for abuse, and has failed to achieve the desired objectives of the State of Missouri.

As noted in the opinion of the Missouri Court Appeals in Breece v. Jett, supra, and also from Prosser, Law of Torts, and by various of the states' legislatures by enacting statutes abolishing this type of cause of action, "There has come to be a realization today that actions of this kind have failed to accomplish their original social purpose and...Such actions are subject to great abuses, causing embarrassment, humiliation and damage...perhaps such actions afford a fertile field for blackmail and extortion." Breece v. Jett, 556 S.W. 2d 969, 707 (Mo. App. 1977).

Further, the stereotypes of "chaste females" needing to be protected from the "wiles of men" since such women are "easily bequiled," Breece v. Jett, 556 S.W. 2d 696, 708 (Mo. App. 1977) are

"archaic and overbroad generalizations." Schlesinger v. Ballard, 419 U.S. 498, 506-507, 95 S.Ct. 572, 576-577, 42 L.Ed. 2d 610 (1975). This stereotyping of females constitutes outdated misconceptions concerning the proper role of females in the home rather than in the "marketplace and world of ideas," Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed. 2d 688 (1975).

The preconception that a female's chastity has to be protected by means of a suit for damages based on the tort of seduction is based upon the stereotypic misconception of the female as a "featherbrain", "easily beguiled" and easily persuaded to "deviate from the path of rectitude" by the "wiles" of "worldly and sophisticated men." The Breece Court addressed this misconception that "the modern woman is not 'easily beguiled' and does not easily fall to the 'wiles of men.'" Breece v. Jett, 556 S.W. 2d 696 at 708.

When Petitioner and Respondent first met, Respondent was twenty-three years old and a nursing student (Tr. 94-96) who received a Batchelor of Science degree in Nursing and

Health Education less than one year later. When Petitioner and she met, she had already completed a total of five (5) years of college education. (Tr. 95). Since that first meeting the Respondent was employed as a registered nurse in at least three different hospitals (Tr. 96, 106,122), had been a nursing supervisor (Tr. 96) and employed as a teacher at Pemiscot County, Missouri Vocational School, teaching a course called "Health Occupations" (Tr. 96). The parties continued their romantic and sexual relationship through approximately three years and two pregnancies of the Respondent, and the Respondent was twenty-seven years of age when she first brought a suit against Petitioner for seduction claiming that she was fraudulently misled by a false promise to marry.

Also, the Missouri law of seduction is unconstitutional because it denies males the fundamental right to have equal access to the courts, a right which is part of the liberty of which a citizen cannot be denied without due process of law under the Fifth and Fourteenth Amendments. There are certain basic rights

within the concept of liberty which are implicit within the Constitution. Equal access to the courts is one of these. As Justice McReynolds of this court stated in Meyer v. Nebraska, 262 U.S. 390 (1923):

> Without a doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Id. at 399.

If liberty means the right "to enjoy privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," then the right to have equal access to the courts is a necessary element of liberty.

Yet, the Missouri seduction law only allows females the right to bring suit for this tort. This means that if any person, male or female, can be seduced, then under the seduction law only a woman can seek redress in the courts. A man who suffers injury as a result of this tortious act is banned from petitioning for relief. This denies males a basic and fundamental right; it

denies them this right without due process of law; and, in doing so, it violates both Fifth and Fourteenth Amendments. Although this issue was addressed in Petitioner's Motion for New Trial (appendix at page 18.), the Missouri Court of Appeals denied deciding the issue, holding that it had not been timely raised below. (appendix at page 18.).

B. **REASONS FOR GRANTING THE WRIT**

The Court should grant the writ of certiorari in this case for several reasons. First, this case gives the Court the opportunity to decide an issue of growing and continuing concern among the states. As noted above, there are presently seventeen (17) states which have by legislative enactment abolished the cause of action (see Footnote 2., supra). An additional eight (8) states have abolished the related tort of breach of promise to marry (see Footnote 3., supra). However, this leaves a total of twenty-seven (27) states wherein the action at common law of seduction is still available.

As noted in the dissenting opinion of Chief Judge Greene, of the Missouri Court of Appeals, (appendix at page 33.), there have

been twenty (20) appellate decisions in seduction cases in Missouri prior to this case, and in his dissenting opinion in the Supreme Court of Missouri, Judge Welliver has listed each and every such case (appendix at page 12.). There have been four (4) such cases in the State of Missouri since 1977, including this case. Greco v. Anderson, 615 S.W. 2d 429 (Mo.App. 1980); Piggot v. Miller, 615 S.W. 2d 429 (Mo. App. 1980); Breece v. Jett, 556 S.W. 2d 696 (Mo. App. 1977). Other states also continue to entertain the cause of action from time to time.[4].

Second, this case involves important questions concerning the constitutionality of a longstanding common law cause of action. These questions of denial of due process and equal protection effect the whole class of citizens of the male gender. Further, while this issue has not been previously dealt with by the

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4. McCraney v. Flanagan, 267 SE 2d 404, 74 N.C. App. 498 (1980).
Slawek v. Stroh, 62 Wis. 2d 295, 215 NW 2d (1974).
Boedges v. Dinges, 428 SW 2d 930 (Mo.App. 1968).
Hutchins v. Day, 153 SE 2d 132, 269 NC 607 (1967).
Robinson v. Moore, 408 SW 2d 582 (Texas Civ. App. 1966).
Tuck v. Tuck, 238 NYS 2d 317 (1963).
Aodland v. Flyn, 211 NYS 2d 221 (1961).
Graham v. Smith, 330 SW 2d 573 (Tenn.App. 1959).
Parker v. Harkum, 201 Va. 441, 111 SE 2d 442 (1959).
Seamons v. Spackman, 81 Idaho 361, 341 P. 2d 442 (1959).
Mazierowski v. Buckley, 39 NJ S.Ct. 534, 121 A. 2d 749 (1956).

Court, many but not all states are beginning seriously to raise these same issues. See generally, W. Prosser and W. Keeton, Prosser and Keeton on The Law of Torts, page 927 (1984); Kline v. Ansell, 414 A. 2d 929 (Md. 1980)(the common law cause of action for criminal conversation declared unconstitutional).

Third, there is a split between the various states wherein approximately one-half have abolished the cause of action or a related form of the cause of action, while the other approximately one-half continue to allow the action. This Court should take this opportunity to resolve these issues as they are of national import.

Fourth, as is demonstrated by this case, and the other three cases that reached the appellate courts of Missouri, the cause of action is being broadened in the state[5.] to allow

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[5.] See comment by Judge Welliver in his dissent to the opinion of the Missouri Supreme Court (App. at page 8.) where he states that:

> This court has never chosen to depart from its holdings prohibiting the woman from bringing the action for seduction. The

much more to be entered as proof of damages in the trial of such causes, thereby increasing the stakes for the potential defendants. As the damage awards tend to increase by doing so, it would follow logically that the potential for abuse of the cause of action in the form of blackmail, extortion, humiliation and embarrassment referred to by the court in Breece v. Jett, 556 S.W. 2d 696, 707-708 (Mo. App. 1977) would also increase. This is so as the potential defendant would face the potential of a tremendously large damage award being returned against him should the case actually be put to trial.

Fifth, it would be appropriate to grant the writ in this case simply because the stakes are so high from Petitioner's point of view, and

court of appeals, however, in the instant cause and in the three other recent cases have enlarged the tort action by permitting the woman to bring suit. Greco v. Anderson, 615 S.W. 2d 429 (Mo. App. 1980); Piggot v. Miller, 557 S.W. 2d 692 (Mo. App. 1977); Breece v. Jett, 556 S.W. 2d 696 (Mo. App. 1977).

because the relief sought herein is not available elsewhere. This case represents the epitome of the wrongness of this type of action in today's society.

The Petitioner respectfully moves the Court to reexamine the common law action of seduction applied by the various state courts because this cause of action serves no legitimate governmental objective and, at the very least, the law should be reexamined where the female is over the legal age of consent and is not incompentent. There is no other area of our law that females are excused or granted immunity from their own voluntary acts where she is mentally competent and a mature, highly trained, educated and experienced woman.

CONCLUSION

For all of the reasons set out above, Petitioner respectfully requests that this Court take jurisdiction of his case and issue a writ of certiorari to the Court of Appeals of Missouri.

RUSSELL X. THOMPSON

JIMMY D. COLLINS
Attorneys for Petitioner
Suite 3232 100 North Main
Memphis, Tennessee 38103
(901) 527-6554

CERTIFICATE OF SERVICE ON COUNSEL

I, Russell X Thompson, attorney for Petitioner, hereby certify, pursuant to Rule 28.3 of the Rules of the Supreme Court, that I have mailed three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Missouri, to Mr. James E. Reeves, attorney at law, at 711, Ward Avenue, Carthersville, Missouri 63830, attorney for Respondent, by placing same in the United States mail, postage prepaid on this 25 day of June, 1985.

RUSSELL X THOMPSON
Attorney for Petitioner

CASE NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1985

RONALD A. BRUNER,	)	
PETITIONER		
VS.	)	ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI
ALICE J. PARKER,		
RESPONDENT	)	

APPENDIX

OFFICE OF THE CLERK

MISSOURI COURT OF APPEALS

SOUTHERN DISTRICT

Wm. C. Cockrill
Clerk

University Plaza
300 Sherman Parkway
SPRINGFIELD, MISSOURI 65806

Telephone
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March 5, 1985

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Caruthersville, MO 63830

Mr. Hal E. Hunter
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545 Virginia
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Mr. Russell X. Thompson
Attorney at Law
100 N. Main Bldg., Suite 3232
Memphis, TN 38103

RE: Alice J. Parker v. Ronald A. Bruner
Case No. 13313

Gentlemen:

Today the Court issued the following orders:

"Now on this day, the Court, having fully considered respondent's motion to strike application for rehearing and to transfer, does overrule said motion."

"Now on this day, the Court, having fully considered appellant's motion for rehearing or to transfer this cause to the Supreme Court of Missouri, does overrule said motion for rehearing and does deny said application for transfer."

Yours very truly,

WILLIAM C. COCKRILL,
Clerk

WCC/dh

SD #13313

IN THE SUPREME COURT OF MISSOURI

January Session 1985

Alice J. Parker,

Plaintiff-Respondent,

vs. TRANSFER

Ronald A. Bruner, Defendant-Appellant.

Now at this day, on consideration of defendant-appellant's Application to transfer the above entitled cause from the Southern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Defendant-Appellant's motion for stay of execution of judgment pending appeal and for temporary stay of judgment pending entry of order on motion moot.

STATE OF MISSOURI-SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1985, and on the 2nd day of April 1985, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 2nd day of April 1985.

_____
Clerk

_____ D.C.

SD #13313

IN THE SUPREME COURT OF MISSOURI

January Session 1985

Alice J. Parker, Plaintiff-Respondent.

vs. TRANSFER

Ronald A. Bruner, Defendant-Appellant.

Now at this day, on consideration of defendant-appellant's Application to transfer the above entitled cause from the Southern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.
Defendant-Appellant's motion for stay of execution of judgment pending appeal and for temporary stay of judgment pending entry of order on motion moot.

STATE OF MISSOURI-SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1985, and on the 2nd day of April 1985, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 2nd day of April, 1985.

_____
Clerk

_____ D.C.

SUPREME COURT OF MISSOURI

en banc

ALICE J. PARKER,

Plaintiff-Respondent,)

vs.) No. 66205

RONALD A. BRUNER,)

Defendant-Appellant.)

APPEAL FROM THE CIRCUIT COURT OF NEW MADRID COUNTY
Honorable John R. Bailey, Judge

PER CURIAM:

This cause was certified to this Court, under Rule 83.01 by a dissenting judge in the Southern District of the Court of appeals. The certifying judge deems the principal opinion in the Court of Appeals contrary to the decisions in Greco v. Anderson, 615 A.W.2d 429 (Mo. App. 1980) and Breece v. Jett, 556 S.W.2d 696 (Mo. App. 1977). He believes Greco and Breece "require proof of seduction by clear, cogent, and convincing evidence *** (and) that the majority opinion does not require such proof."

In Greco, there is no mention of the burden of proof required in a seduction case. In Breece, the mention of the required burden of proof is obiter dictum and not authority as a precedent in Missouri. "There is no doctrine better settled than that the language of judicial decisions must be construed with reference to the facts and issues of the particular case, and that the authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the Court, and necessary to a decision." State ex rel. Baker v. Goodman, 364 Mo. 1202, 1212, 274 S.W.2d 293, 297 (banc 1954).

The opinion of the Court of Appeals is not contrary to any previous decision of another appellate court of this State and we are not obliged to retain this cause.

Accordingly, the cause is retransferred to the Southern District of the Court of Appeals. See Morris v. Granger, 675 S.W.2d 15 (Mo. banc 1984).

Rendlen, C.J., Higgins, Gunn, Blackmar and Donnelly, JJ., concur; Lowenstein, Sp.J., concurs in result in separate opinion filed; Welliver, J., dissents in separate opinion filed. Billings, J., not sitting.

SUPREME COURT OF MISSOURI

en banc

ALICE J. PARKER,)

Respondent,

v.) No. 66205

RONALD A. BRUNER,

Appellant.)

CONCURRING OPINION

I concur in result. The certification under Rule 83.01 was not effective for the reasons stated in the majority opinion. That being so, there is really no justifiable reasons under the rules for this case to now stay within this Court's jurisdiction. State v. Higgins, 592 S.W.2d 151, 152-23 (Mo. banc 1979), relied upon by the dissent involved a transfer on the Western District's own motion prior to opinion. This Court ruled the constitutional question raised as reason for the transfer did not exist, but, relying upon Rule 83.06 and, Foremost-McKession, Inc. v. Davis, 488 S.W. 2d 193 (Mo. banc 1972), retained the case in the interest of judicial economy. Foremost-McKesson, supra, involved a declaratory judgment and request for injunctive relief by mile distributors over rules and regulations promulgated by the Commissioner of Agriculture which had considerable effect upon the sale of milk in the state. Despite the apparent lack of a substantial constitutional question this Court kept the cause which had come straight from the trial court. Neither the rules nor Higgins and Foremost-McKesson provide for jurisdiction here of this case which was improvidently certified after opinion. To do otherwise would ameliorate Rule 83.02 which here gives the Southern District the opportunity to address the substantial question raised in the dissent. Although this Court "may" accept transfer after the district's own motion under Rule 83.02, at least that whole court would have had the chance to address the matter. Also still available are the motions of the losing party to rehear and transfer or to ask this Court to consider transfer. Rules 83.02 and 83.03.

The paucity of cases in Missouri for damages for seduction indicate the lack of urgency to resolve the continuation of the doctrine. Unlike Higgins, where a life sentence was imposed for first degree murder, or the activities in Foremost-McKesson, this case does not justify allowing circumvention of the whole Southern District's right to first address the matter.

If the posture here were different, and this Court could now consider this case either on motion from the Souther District or on motion of a party, I would favor reversal and abolishing the cause of action for seduction, or allowing a plaintiff to recover only her actual damages and no recovery for punitive damages.

HAROLD L. LOWENSTEIN,
SPECIAL JUDGE

SUPREME COURT OF MISSOURI

en banc

ALICE J. PARKER,)

Respondent,

V.) No. 66205

RONALD A. BRUNER,

Appellant.)

DISSENTING OPINION

I respectfully dissent. The per curiam properly holds that the certificate of the dissenting judge shows no apparent conflict between the cited appellate decisions. It is regrettable that the matter was certified by the single dissenting judge rather than by appellant filing his application to transfer, a procedure I believe still available to him. The real conflict is that this court has never recognized that the participating woman can bring an action for seduction. The trend against permitting the participating woman from bringing such action together with the question of whether such action can be available to participating women and not to participating men are of sufficient general interest in my opinion to require us on the application of appellant to order transfer of the case. For these reasons, I would retain jurisdiction in the interest of judicial economy. State v.

Higgins, 592 S.W.2d 151, 153 no. 1 (Mo. banc 1979). I would reverse.

The original petition involved only determination of paternity costs of child birth and child support, which subsequently was denominated as Count 1 of the amended petition. The amended petition added Count 11 which sought damages for seduction, both actual and punitive. After blood tests, appellant admitted all allegations regarding paternity and by his answer asked the court to fix the amount of costs of the child birth and child support. The matter was tried solely on Count 11, which alleged seduction. Respondent received a verdict for twenty-five thousand dollars actual damages and fifty thousand dollars punitive damages. Appellant argues, inter alia, that the archaic common law action for seduction should be abolished.

The common law action for seduction is a relic of a lost era. "(S)eduction is the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have and do have that effect, and result in her ultimately submitting her person to the secual embraces of the

person accused." 70 Am. Jur. 2d Seduction § 1 (1973). The action arose as one of many judicial remedies available for interference with domestic relations. See generally, Pound," Individual Interests in the Domestic Relations," 14 Mich. L.Rev. 177 (1916). At common law, the action could be brought only by a parent--generally only the father--who was injured by the loss of services that resulted when their daughter was seduced. The common law offered two reasons why the seduced woman could not bring the action herself. First, the injury that the law protected against was the loss of services by one entitled to the services of the seduced woman. "The law developed as an offshoot of the action for enticing away a servant and depriving the master of his quasi-proprietary interest in his services. The wife and minor children were considered, in early common law, as superior servants (above all other servants) of the husband and father; loss of their services became the gist of his action." Magierowski v. Buckley, 39 N.J. Super. 534, 121 A.2d 749, 753 (1956). Courts almost uniformly have held that the "action for seduction, in whatever form it may be brought, is founded upon the supposed loss of service by the plaintiff, and it must of course be alleged and proved that the relation of

master and servant existed when the injury was committed." Vossel v. Cole, 10 Mo. 395, 396 (1847). Some courts came to recognize that the loss of services is but a legal fiction and sub silento upheld the parent's action as one for interference with family relations. Magierowski v. Buckley, supra, at 755. Second, "the seduced woman was denied a civil action for damages, on the ground that she was a 'consenting party,' violenti non fit injuria, or equally at fault, in pari delicto." Feinsinger, "Legislative Attack on 'Heart Balm,'" 33 Mich. L. Rev. 979, 986 (1935). A few jurisdictions, however, either by court decisions or statute, came to consider the parent's action as another legal fiction and altered the common law by permitting the woman herself to maintain the action. See generally W. Prosser & W. Keeton, Prosser & Keeton on the Law of Torts 927 (1984). See also Magierowski v. Buckley, supra, at 752.

Up until 1977, the law in Missouri was well settled that only the person entitled to the woman's services could bring a cause of action ex delicto for seduction. "It is settled that a woman cannot maintain an action for damages against her seducer." Jordan v. Hovey, 72 Mo. 574, 576 (1880). Prior to 1977, there are only

fourteen actions for seduction. See Carader v. Forehand, 1 Mo. 504 (1826); Vossell v. Cole, supra; Grider v. Dent, 22 Mo. 490 (1856); Heinrich v. Kerchner, 35 Mo. 378 (1865);McKern v. Calvert, 59 Mo. 243 (1875); Morgan v. Ross, 74 Mo. 318 (1881); Comer v. Taylor, 82 Mo. 341 (1884); Smith v. Young, 26 Mo. App. 575 (1887); Bailey v. O'Bannon, 28 Mo. App. 39 (1887); Hartman v. McCrary, 59 Mo. App. 571 (1894); Mohelsky v. Hartmeister, 68 Mo. App. 318 (1896); Koenke v. Bauer, 162 Mo. App. 718, 145 S.W. 506 (1912); Owens v. Fanning, 205 S.W. 69 (Mo. App. 1918); Boedges v. Dinger, 428 S.W.2d 930 (Mo. App. 1968) (count two of plaintiff's petition). A somewhat similar cause of action available to the seduced woman was a contract action ex contractu--for the breach of a promise to marry, with the woman often alleging seduction as a factor aggravating the amount of damages sought. See e.g., Green v. Spencer, 3 Mo. 225 (1934); Roper v. Clay, 18 Mo. 383 (1853); Davis v. Slagle, 27 Mo. 600 (1859); Wilbur v. Johnson, 58 Mo. 600 (1875); Jordan v. Hovey, supra, Bird v. Thompson, 96 Mo. 424, 9 S.W. 788 (1888); Haus v. Moeller, 107 Mo. 471, 18 S.W. 884 (1891); Liese v. Meyer, 143 Mo. 547, 45 S.W. 282 (1898); Harmon v. Donohoe, 153 Mo. 263, 54 S.W. 453 (1899); Cole v. Holliday, 4 Mo. App. 94 (1877); Walters v. Cox, 67 Mo. App. 299 (1896); Trammell

v. Vaughn, 158 Mo. 214, 59 S.W. 79 (1900); Broyhill v. Norton, 175 Mo. 190, 74 S.W. 1024 (1903); Clemons v. Seba, 131 Mo. App. 378, 111 S.W. 522 (1980); Erwin v. Jones, 192 Mo. App. 326, 180 S.W. 428 (1915); Fitch v. Coats, 1676 S.W.2d 478 (Mo. App. 1943); Boedges v. Dinger, supra. This Court has never chosen to depart from its holdings prohibiting the woman from bringing the action for seduction. The court of appeals, however, in the instant cause and in three other recent cases have enlarged the tort action by permitting the woman to bring the suit. Greco v. Anderson, 615 S.W. 2d 429 (Mo. App. 1980); Piggot v. Miller, 557 S.W.2d 692 (Mo. App. 1977); Breece v. Jett, 556 S.W.2d 696 (Mo. App. 1977). See generally Comment, "Seduction and Fraud--An Honorable Marriage?" 47 UMKC L. Rev. 404 (1979).

The factors prompting the public outcry during the mid 1930's against actions for seduction and other related torts,[1] coupled with the changing public mores and enlightened social conscience suggests that we abolish rather than enlarge the tort of seduction which the judicial branch itself created. Cf. Abernathy v.

Sisters of St. Mary's, 446 S.W.2d 599, 606 (Mo. banc 2969). During the 1930's "(p)ublic opinion almost universally favored the abolition" of such actions. Magierowski v. Buckley, supra, at 757. Some of the reasons for this national attention and national trend are suggested by Prosser and Keeton:

> Those actions for interference with domestic relations which carry an accustion of sexual misbehavior--that is to say, criminal conversation, seduction, and to some extent alienation of affections--have been peculiarly susceptible to abuse. Together with the action for breach of promise to marry, it is notorious that they have afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force settlement. There is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives; that it is impossible to compensate for such damage with what has decisively been called "heart balm;" that people of any decent instincts do not bring an action which merely adds to the family disgrace; and that no preventive purpose is served, since such torts seldom are committed with deliberate plan.

W. Prosser & W. Keeton, supra, at 929. Additionally, Professor Feinsinger explained that "(t)he underlying explanation is probably a realization of the failure

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1. See Note, Avoidance of the incidence of the Anti-Heartbalm Statutes," 52 Colum. L. Rev. 243 (1952).

of these actions to accomplish their original social purposes, and their non-conformity with changed mores concerning sex morality, the status of women, and the functions of the family." Feinsinger, supra, at 979. A similar sentiment was expressed by judge Simeone, in his scholarly court of appeals opinion in Breece v. Jett, supra.

> Whether an action for seduction should be retained in contemporary society as a matter of judicial policy is highly questionable. The arsenal of such judicially abolished by legislatures of several states for a multitute of reasons. Recent social trends and the changing mores of contemporary society concerning sex and morality and the new found status of women may well make the action for seduction a remedy of a bygone era. In many states civil actions for sexual involvement have been abolished by the so-called "Hear Balm Statutes." There has come to be a realization today that actions of this kind have failed to accomplish their original social purpose and are considered by many jurisdictions to be socially unwise. Such actions are subject to great abuses, causing embarrassment, humiliation and damage to persons who may be wholly innocent and perhaps such actions afford a fertile field for blackmail and extortion.
>
> The woman of today is not the woman of yesteryear. She has a new-found freedom. The modern adult woman is sophisticated and mature. The former notion that women belong to the weaker sex has long been abandoned. The modern woman is not "easily beguiled" and does not easily fall to the "wiles" of man. Women desire and should be held to a reasonable responsibility.
>
> While we believe that an action for seduction is socially unwise in modern society, we believe that as an intermediate appellate court we cannot abolish the action.

Id. at 707-08. Retaining the cause of action for seduction can only mean perpetuating a false stereotype of the modern woman. It is not the function of the judiciary to assist in perpetuation such archaic mores.[2] Other remedies are available which are not based upon fictions or a tort embodying debasing assumptions of women.

Although our brother Simeone did not have an occasion to make his words in Breece a pronouncement of this Court, the time has come for us to do so. We should abolish the action of seduction.

The cause should be reversed.

WARREN D. WELLIVER, Judge

2. Although I would dispose of this case for the reasons expressed by my opinion, I also have grave reservations over whether the law of seduction would pass constitutional muster. The cause of action favors outmoded stereotypes of women and thereby denies men the right to sue for seduction. There is no valid reason for such a distinction, W. Prosser & W. Keeton, supra, at 926, and the constitutionality of such a classification is highly questionable. See Kline v. Ansell, 414 A.2d 929 (Md. 1980) (the common law cause of action for criminal conversation unconstitutional.)

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
DIVISION THREE

ALICE J. PARKER,)

Plaintiff-Respondent,

vs.) No. 13313

RONALD A. BRUNER,

Defendant-Appellant.)

APPEAL FROM THE CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI

Honorable John R. Bailey, Judge

James E. Reeves of Caruthersville for Plaintiff-Respondent

Russell X. Thompson of Memphis, Tennessee
Hal E. Hunter, Jr. of New Madrid for Defendant-Appellant

AFFIRMED

PREWITT, J. Based upon a claim of seduction, plaintiff received a verdict for twenty-five thousand dollars actual damages and fifty thousand dollars punitive damages. Judgment was entered accordingly and defendant appeals.

We first mention defendant's contention that the trial court erred in overruling his motion for judgment notwithstanding the verdict because the action of seduction violates his constitutional rights. This point is set out in full below.[1] This contention was first

raised in defendant's after trial motions.

To raise and preserve a federal or state constitutional question for appellate review, it must be raised at the first available opportunity. State v. Tatum, 653 S.W. 2d 241, 243 (Mo.App. 1983); Kansas City v. Howe, 416 S.W.2d 683, 686 (Mo.App.1967). It is obvious that this contention could have been raised earlier by a motion directed at the petition and during the trial. As this point was not preserved for review, it is denied.

The next contention of defendant that we discuss is his assertion that the evidence was insufficient to support the cause of action "because there was no evidence that Appellant had made any promise or other inducement of marriage, other false promises, artifices or solicitations; nor that Appellant made any promise, statement, or other inducement regarding marriage, knowing it to be false; nor that Respondent relied upon any such promise or inducement in consenting to sexual

I.

The TRIAL COURT ERRED in overruling Appellant's motion for judgment notwithstanding verdict on the basis that the cause of action of seduction is violative of Appellant's rights to equal protection and due process under the 5th and 14th Amendments to the United States Constitution because the action of seduction, as defined by Missouri Law and as applied to Appellant in this case, is unconstitutional and unfairly and unreasonably discriminates against Appellant because of his sex, and places a different burden

intercourse with Appellant; nor that Respondent surrendered her chastity because of any promise made by Appellant."

In reviewing a claim that the evidence is insufficient to support the verdict, we consider the evidence and reasonable inferences therefrom most favorable to plaintiff. Ogle v. Webb, 623 S.W.2d 582, 583-584 (Mo. App. 1981).

There are two elements of seduction which defendant contends were lacking in proof. These elements are described in Breece v. Jett, 556 S.W.2d 696, 707 (Mo.App. 1977), as (1) conduct of the defendant consisting of "solicitations, importunities, misrepresentations, knowingly false promises or artifices, including a false promise to marry for the purpose of seduction", and (2) intercourse occurring "because of the false solicitations, importunities, false promises or false promise to marry". See also Greco v. Anderson 615 S.W.2d 429, 431 (Mo.App. 1977).

on males than upon females with respect to the tort of seduction, and further, because the tort of seduction, under Missouri law, may only be committed by a male upon a female and, therefore, constitutes gender-based and unlawful discrimination against Appellant because of his sex.

Viewed in the light most favorable to plaintiff, we find that the evidence was sufficient to supply these elements.

At the time they met plaintiff was 23 years of age and defendant was 34. She was a nursing student and he a practicing dentist. Defendant had previously been married and divorced. Plaintiff testified that she had not previously engaged in sexual intercourse.

They met at an apartment swimming pool in Caruthersville, Missouri on August 18, 1979. He had an apartment there. She lived in Caruthersville and was visiting a friend who lived in the apartment house. They started dating the next day and saw each other every weekend for several months. She was attending college at Murray State University in Murray, Kentucky, and would either come home on weekends or he would go there or they would go somewhere else.

They took several trips together between their meeting and November 21, 1979, when their first sexual intercourse took place at his apartment. Plaintiff testified that on these trips she resisted his sexual advances and either stayed in a separate room or in a

separate bed in the same room. She did so because she had religious beliefs that she should not have sexual intercourse until she was married.

Plaintiff said she believed that because of defendant's prior marriage it was difficult for him to have a relationship without sex. She told him she wanted to wait until she was married, and she suggested that he might date others but he said "I don't want anybody else, Alice. I want you, I want a life with you and that's all I want."

Plaintiff testified that he frequently told her he loved her, and wanted to express his feelings through making love to her. Defendant testified that he did not love her and never told her that. She said he often talked about "(w)hen we get married" and what they might do "(i)n our marriage". She said that defendant told her "he did want me to marry him."

After they had dated several weeks he was "very persistent" and they had arguments over her refusal to consent to sexual intercourse. When he told her that he did not want to have sexual relations with any other woman "he looked like he was gonna cry. He, he was real upset. I've never seen him that upset that much, seemed

like he cared that much."

She said she finally consented to have sexual relations with him "after all that time and all that fighting. I'm not sure exactly how it happened, I just know it happened, and I, and I know that I, that I loved him and I know that I believed that he loved me and I know that I felt that we were gonna have a life together, otherwise I wouldn't of."

After two pregnancies, the first terminated by a voluntary abortion, their relationship ended when plaintiff refused to follow defendant's insistence that she have a second abortion.

A jury could find that in order to convince her to engage in intercourse with him he falsely said that he loved her and that they would be married when he did not intend to marry her. There was evidence that they went so far as to obtain a marriage license after the first time she became pregnant and he indicated that he would marry her and then declined. However, that does not establish that his promises were not falsely made for the purpose of inducing her to engage in intercourse a considerable time previously.

Defendant's discussion of their future marriage,

when he admittedly did not live her, creates a strong inference that he never intended to marry her and combined with his false statements about loving her indicates that he was making the statements to induce her to have intercourse. She testified that she took these statements to be an indication that they would be married and that he loved her and in reliance upon them, she engaged in intercourse with him.

The jury obviously rejected defendant's testimony that they first had intercourse on September 9, 1979, and that before he had only told her that he "enjoyed being with her." He testified that she was the aggressor but he did "(n)ot strongly" resist.

Although the plaintiff's evidence, if believed, may indicate naiveness on the part of plaintiff, whether she believed the things said was for the jury. They may have determined that this was a situation where a college student with little worldly experience and no previous serious romantic involvement or sexual experience was misled and seduced by a sexually experienced older professional man. There was evidence that he was making $285,000 annually and was able to buy her gifts and take her on expensive trips. His attention and statements

may have been such that would prevent an inexperienced woman such as plaintiff from comprehending his true objective.

Defendant's contention that plaintiff did not make a submissible case for the jury's consideration is denied. Compare the evidence here with that in Boedges V. Dinges, 428 S.W.2d 930 (Mo.App. 1968).

We next discuss defendant's contention that the trial court erred in allowing plaintiff's attorney to read excerpts from defendant's deposition. Defendant raises several objections to the use of the deposition, none of which have any validity. The full point is set out below.[2.]

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2. "THE TRIAL COURT ERRED in overruling Appellant's objections to counsel for Respondent reading selected excerpts from the Appellant's pre-trial deposition to the jury because said deposition had not been properly filed with the Court pursuant to Missouri Rule of Civil Procedure 57.07(d)(4), and because no notice had been given to the Appellant's counsel that said deposition was to be used as evidence and Appellant's counsel was therefore unable to prepare for the said deposition being read by making the proper pre-trial objection to inadmissible testimony, and because the deposition had been taken pursuant to the Respondent's original petition, count one for paternity, and therefore, the deposition was irrelevant to Respondent's mended petition for seduction and was immaterial, and the reading of the deposition was further improper because the Defendant was present in the courtroom at the time the deposition was read to the jury and said readings were not admissions against interest, nor used for impeachment, but were selective readings of portions

The deposition of a party may be used by an adverse party for any purpose. Rule 57.07(a)(2); City of Town and Country v. St. Louis County, 657 S.W.2d 598, 608 (Mo. banc 1983); Teachenor v. DePriest, 600 S.W. 2d 122, 125 (Mo.App. 1980).

In respect to admissions against interest the deposition of a party is like any other evidence. A statement made in a deposition relevant to the issues may be admitted against the deponent as admissions against interest in the same or another action to which he is a party, even though he is present in court and able to testify, or has tesified. Teachenor v. DePriest, supra, 600 S.W.2d at 125. There is no requirement that notice be given to defendant's counsel that plaintiff's attorney would read admissions from it.

If the admissions were made, whether the deposition was filed would not make any difference. Filing it could bear on the proof showing that the statements were made, but here that defendant said them was not questioned.

This point is denied.

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of the deposition which included leading questions and hearsay testimony.

We next discuss defendant's contention that the trial court erred in overruling his motion in limine. The point contends this allowed plaintiff to present evidence of "continued sexual relations between the parties on a regular basis for over a period of more than two years after the first act of intercourse and the alleged seduction, and also allowed the Respondent to present evidence of her abortion, a subsequent pregnancy, the birth of a child almost two years subsequent to the alleged seduction, pre-natal expenses incurred by Respondent and many other facts and circumstances which were not relevant to the alleged seduction." The full point is set out below.[3] After the motion was overruled no objections were made as the evidence was presented.

It could be questioned whether this point is before us as the overruling of a motion in limine cannot by itself be reversible error, and after the denial of a motion in limine a timely objection is required to preserve the point for appellate review. Peters v. Henshaw, 640 S.W.

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3. THE TRIAL COURT ERRED in overruling Appellant's motion In Limine to limit the Respondent's evidence to the facts and circumstances reasonably related to the first sexual intercourse between the parties because the tort of seduction is not a continuing tort, and the Court's ruling allowed the Respondent to present evidence of continued sexual relations between the parties on a

2d 197, 201-202 (Mo.App. 1982).

However, due to an indication that there may have been a "standing" objection to this evidence, apparently based on the motion in limine, we discuss this point further.

The motion in limine sought to limit the evidence presented by the plaintiff "to the first act of intercourse between the parties". The body of the motion is set out in full below.[4] As the point indicates and as counsel confirms in oral argument, the contention regarding this evidence is not the same as that presented to the trial court by the motion. In oral argument before us defendant's counsel admitted that evidence of the parties' relationship following the initial act of

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regular basis for over a period of more than two years after the first act of intercourse and the alleged seduction, and also allowed the Respondent to present evidence of her abortion, a subsequent pregnancy, the birth of a child almost two years subsequent to the alleged seduction, pre-natal expenses incurred by Respondent and many other facts and circumstances which were not relevant to the alleged seduction and which were not proximately caused by the alleged act of seduction, and which were so remote in time and unconnected from the original alleged act of seduction as to be wholly improper, inflammatory and highly prejudicial none of which were relevant to the issue before the Court.

4. Comes now the defendant and moves the Court to limit the evidence presented by the Plaintiff herein to the first act of intercourse between the parties, which

intercourse would have been admissible on the issue of damage until the "intervening" acts of the abortion and defendant telling plaintiff he would not marry her.

It is obvious then that the motion was sought to prevent at least some evidence that defendant now acknowledges was admissible. Defendant has thus admitted that the motion was improper as presented and should have been denied. The argument now presented is that after the abortion and defendant's refusal to marry plaintiff, no further evidence of their relationship nor of the second pregnancy and birth of the child should have been allowed. Defendant now says that it was the intervening cause of the abortion and the refusal to marry that terminated the evidence. This is a different argument than made before the trial court. A party cannot change his theory of objection on appeal and have it preserved for review. "(N)o allegations of error shall be considered in any

according to Plaintiff's Petition occurred November 12, 1979. That this is a suit for seduction and that the material evidence would only have to do with the first act of intercourse, which according to Plaintiff's Petition occurred November 12, 1979, which would be the seduction, and any additional or other acts of intercourse between the parties would be totally immaterial and made only to prejudice or inflame the jury.

civil appeal from a jury tried case except such as have been presented to or expressly decided by the trial court." Rule 84.13(a). See also Walker v. Woolbright Motors, Inc., 591 S.W.2d 289, 291 (Mo.App. 1979).

Even if the contentions now made are essentially the same as presented to the trial court, there still could not be error in the ruling complained of. The trial court did not rule that the evidence now complained of in this point was admissible. By overruling the motion it indicated that some evidence of the parties' acts following the initial intercourse may be admissible. The point contends that the trial court erred in overruling the motion in limine. Defendant now admits that the motion was not correct as some of the evidence it sought to prevent was admissible, so there could be no error in overruling it. This point is denied.

We next discuss defendant's contention that the trial court erred in allowing plaintiff's child to remain in the courtroom and in not granting relief in other particulars regarding the child. Defendant's full point is set out below.[5]

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[5] THE TRIAL COURT ERRED by allowing the Respondent's infant child to remain in the courtroom during the trial and by denying Appellant's motion to exclude the child and Appellant's motion for a mistrial after the Respondent

We conclude that the court's rulings in regard to the child were not an abuse of discretion. In Rehg v. Giancola, 391 S.W.2d 934, 937 (Mo.App. 1965), the court said:

> "In this state in criminal actions where a defendant's liberty, or even his life, is at stake, it has been held that the exhibition of an infant is within the sound discretion of the court. (Citing cases) If such is permitted in criminal cases it can hardly be said that the discretion of the trial court would not be

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brought the infant child to the counsel table with her, in front of the jury, and while the Judge was out of the courtroom during which time Respondent displayed and played with the infant child for some time in front of the jury; and the trial Court further erred in permitting Respondent's attorney to go out of the courtroom and bring the Respondent's infant child in the presence of the jury and confront the Appellant with the infant child with the question, "Isn't this your child?"; because the question of paternity and the fact that there was a child born more than two years after the alleged act of seduction occurred was irrelevant to Respondent's seduction claim, and the display of the child in the manner described had the effect of inflaming and prejudicing the jury against Appellant and engendering sympathy toward the respondent and the child. Further, the trial Court erred in not granting a mistrial for the reason that the question of paternity was admitted by Appellant and the action for paternity by Respondent was dismissed prior to the trial and was, therefore, not at issue.

extended to the showing of a child in a civil case." Evidence regarding the child came in without objection.

Seeing the child thereafter would not be so prejudicial as to constitute an abuse of discretion. This contention is denied.

Defendant asserts in his remaining point that an instructional error was committed. This allegation was not mentioned in defendant's motion for a new trial so it is not before us. Rule 70.03; Rule 84.13; Romines v. Donald Maggi, Inc., 636 S.W.2d 130, 132 (Mo. App. 1982).

The judgment is affirmed.[6]

James K. Prewitt, Judge

Crow, P.J., and Hogan and Maus, JJ., concur; Green, C.J., dissents and files Dissenting Opinion.

6.

This footnote was added by the author of the opinion after its initial circulation and the voting on it.

The dissent requests that this matter be transferred to the supreme court for two reasons, reexamination of the existing law and because this opinion is in conflict with Breece v. Jett, supra, 556 S.W.2d 696, and Greco v. Anderson, supra, 615 S.W.2d 429, as those decisions require proof of seduction by clear, cogent and convincing evidence.

Transfer for the purpose of reexamining the existing law requires an order by a majority of the participating judges. Mo. Const. Art. V, §10;Rule 83.02. A majority has not ordered transfer here.

Greco does not mention the standard of proof necessary in a seduction action. Breece states that seduction is a species of fraud and the evidence to support it must be clear, cogent and convincing. 556 S.W.2d at 707. That is not the general rule as to fraud. Crawford v. Smith, 470 S.W.2d 529, 531-532 (Mo. banc 1971). See also In the Matter of the Estate of Mitchell, 610 S.W.2d 681, 687-688 (Mo.App. 1980). The practicality of such a standard in a seduction case can be questioned.

If such actions are to be maintained, and it is not for this court to make that determination, that standard could create an insurmountable burden. The intercourse and such acts as show that the female consented because of misrepresentation are not likely to occur before others and knowledge of them is most often limited to the participants.

The statement in Breece is dictum and may not be in conflict with this opinion. However, as transfer because the majority opinion is contrary to a previous decision of an appellate court of this state is the prerogative of a dissenting judge, see Mo. Const.Art. V. §10, Rule 83.01, whether transfer is proper on that ground is not for the other participating judges to decide. On that basis this case is being transferred as requested in the dissent.

ALICE J. PARKER,)

Plaintiff-Respondent,

vs.) No. 13313

RONALD A. BRUNER,

Defendant-Appellant.)

DISSENTING OPINION

GREEN, C. J. To me, there are at least three reasons why the judgment in this case should be reversed. The first is the very nature of the cause of action itself. Seduction is a common law remedy, whose roots are in ancient times. It was formerly an exclusive action by a father to collect for the loss of services of his daughter who had usually become impregnated by some local swain. In time, the courts came to realize that the loss of services claim was fictional, and permitted the woman to sue in her own name, seeking damages for loss of reputation, embarrassment, etc. See Prosser, Law of Torts, 4th Ed., pp. 885-886 (1971).

In the entire legal history of the state of Missouri, there have only been 20 appellate decisions in seduction cases, starting with Carder v. Forehand, 1 Mo. 704 (1826), in which case $40 in damages was awarded, to Greco v. Anderson, 615 S.W.2d 429 (Mo. App. 1980), which acknow-

ledged that the action of seduction is a common law tort bottomed in fraud. Most of these decisions occurred in the 19th century. The time has come to judicially repudiate this ancient doctrine which was artificially created by the courts of Missouri over 150 years ago. The doctrine is sexist, socially unwise, and subject to great abuse, as it provides a fertile field for blackmail, extortion and perjury, since it calls for no proof, according to the majority opinion, other than the allegations of the allegedly deflowered female, plus a pregnancy to justify her claim for damages.

The one-time held notion that women are "the weaker sex" is a myth, as modern women are not easily misled by panting males with sexual propositions. This is especially so when the woman in question is a mature adult. Here, the woman in question was 26 years old and a registered nurse at the time of her second impregnation by Bruner. At trial, she talked learnedly of condoms, IUD's, foam, withdrawal and other contraceptive methods. Their sexual encounters, by her own words, lasted from at least November of 1979 until April of 1982, punctuated by Bruner giving her at least $4,000 in the form of 17 checks, stays in hotels and motels

throughout the country, and two pregnancies, one ending by voluntary abortion in January of 1981, and the second resulting in the birth of a child in 1982. To say that a seduction action could be maintained under such facts amounts to a perversion of justice. See Breece v. Jett, 556 S.W.2d 696, 707-708 (Mo.App. 1977) for a similar view.

While this court cannot abolish the cause of action by judicial fiat, the Supreme Court of Missouri, which created the doctrine, can. Abernathy v. Sisters of St. Marry's, 446 S.W.2d 559-605-6 (Mo. banc 1969); Anderson v. Cahill, 528 S.W.2d 742, 749 (Mo. banc 1975). The doctrine should be abolished, and this case is a proper vehicle to do so.

The second reason why I disagree with the majority opinion is that in Missouri a seduction action is a species of fraud and the evidence to support a judgment in such cases must be clear, cogent, and convincing. Such evidence must show that the defendant knowingly made false representations, including a false promise to marry, for the purpose of seduction, which causes a chaste unmarried woman to consent to sexual intercourse. The evidence must show that the woman had a right to rely on the false promises, that she did rely on them, and, that as a

result of such reliance, engaged in sexual intercourse with the defendant. Breece v. Jett, supra, at 707.

The only evidence that shows a promise made by Bruner to Alice was her testimony regarding an implied promise to marry her before the first act of sexual intercourse and promises thereafter, and before her first pregnancy that he "would make an honest woman" out of Alice if she became pregnant. The mere fact that Bruner did not marry her after she became pregnant is not enough, standing alone, to maintain Alice's burden of proof by clear, cogent, and convincing evidence in an actionalbe fraud cause. Brennaman v. Andes & Roberts Brothers Const. Co., 506 S.W.2d 462, 465 (Mo. App. 1973). There would have to be clear, cogent and convincing evidence that at the time he promised to marry her, Bruner had no intention of doing so.

While fraud, grounded on a concealed intention not to perform a certain promise, may be inferred from facts and circumstances (Wallach v. Joseph, 420 S.W. 2d 289, 294 (Mo. 1967), cert. denied, 389 U.S. 953, 88 S.Ct. 335 (1967),), in this case there are no facts and circumstances to justify such a premise. Here, there was not only a complete failure of proof that

Bruner did not intend to honor his implied promises to marry Alice when he made them, there was evidence, such as buying her an engagement ring and applying for a marriage license, that showed he actually took steps to perform that promise, but later changed his mind.

Under such facts, Alice did not make a submissible case. Dillard v. Earnhart, 457 S.W.2d 666, 671 (Mo. 1970); Bauer v. Adams, 550 S.W.2d 850, 853-854 (Mo.App. 1977); Grosser v. Kandel-Iken Builders, Inc., 647 S.W.2d 911, 915 (Mo.App. 1983). I do not find any actionable fraud and, therefore, no seduction from the facts in this case. I believe the trial court committed prejudicial error in denying Bruner's motion for judgment in his favor. Assuming the validity of the seduction doctrine, I would reverse the judgment outright for failure of plaintiff to make a submissible case.

The final reason why the trial court's judgment should not stand is that, assuming that the tort of seduction should continue to be a viable doctrine in Missouri, and that plaintiff made a submissible case, the evidence submitted as proof of damages, over the standing objection of defendant following the overruling

of his motion in limine, was far in excess of that permitted by law.

The tort of seduction allows recovery for loss of chastity. Continuation of sexual relations by the parties after the first such encounter does not cause a continuing tort, or series of torts. While it has been judicially recognized that a woman whose chastity has been compromised can reform, and thereafter be seduced again, such reformation presupposes a termination of the original relationship, and a new inducement in order to allow her to be compromised again. Absent such a reformation, which is not even claimed by plaintiff here, the seduction is complete on the date when the woman's chastity was originally compromised, which occurred here in November of 1979, if one believes Alice was seduced. Greco v. Anderson, 615 S.W.2d 429, 431 (Mo.App. 1980).

Even if Alice was to be permitted to show as damages, as some ancient cases suggest, her first pregnancy and ensuing abortion, there is nothing that I know of that should permit her after she knew Bruner would not marry her if she became pregnant, to introduce evidence, over objection, of her second pregnancy and subsequent birth of her child, as there is not a scintilla of

evidence that she was induced by new false promises to resume her exual relationship with Bruner. The majority opinion dodges this issue by attempting to split hairs over the fact that since the motion in limine sought to exclude all evidence of sexual contact after the first time, the failure to state in the motion that some of the evidence might be admissible and some not was fatal to defendant's claim. I find no basis in law for such reasoning.

After being given a free lane and a fast track by the trial court on this issue, plaintiff's counsel proceeded to make the most of it. In addition to Alice's testimony concerning the birth of the child and its rejection by Bruner, there was evidence that her lawyer brandished the baby in Bruner's face in the jury's presence, demanding that he acknowledge his son. Alice also fondled and played with the baby in the jury's presence, over objection. In my opinion, what occurred here was a circus, not a trial. I believe the trial court erred in overruling the motion in limine, at least to the extent of allowing evidence of sexual relations after the abortion, the ensuing second pregnancy, and

the birth of the child. This error would justify reversal and remand, if I am wrong in my first two reasons given for reversal.

For the reasons stated, I respectfully dissent. I request that this case be transferred to the Supreme Court after opinion for re-examination of existing law, and further, because the majority opinion is in conflict with existing Missouri appellate decisions (Breece v. Jett and Greco v. Anderson, supra) in that those decisions require proof of seduction by clear, cogent, and convincing evidence, and it is obvious that the majority opinion does not require such proof. Rules 83.01 and 83.02, V.A.M.R.

Douglass W. Greene, Chief Judge

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(8)

No. 84-2002

IN THE SUPREME COURT OF THE UNITED STATES

RONALD A. BRUNER,

PETITIONER,

V.

ALICE J. PARKER,

RESPONDENT,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The Supreme Court does not have jurisdiction because the Missouri Supreme Court did not decide the constitutional issue attempted to be raised by Petitioner. The Missouri Court did not rule the issue because it had not been properly raised and preserved as required by long standing Missouri practice.

The common law action for seduction is not unconstitutional gender based classification because it does not favor solely women and there is no Missouri decision denying this common law remedy for men. Further, if the action were maintainable only by women, it not unconstitutional because it has a fair and substantial relationship to Missouri's interest in protecting previously chaste women and the prevention of illegitimate births induced by fraudulent representations and false promises of men seeking their sexual gratifications.

ARGUMENT

I

THE SUPREME COURT DOES NOT HAVE JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 USC 1257. Before jurisdiction may be invoked under 28 USC 1257, the constitutional issue must be raised and decided by the State's highest court, in this case, the Missouri Supreme Court. Neither the Supreme Court of Missouri nor the Missouri Court of Appeals decided the constitutional issue attempted to be raised in this Court. The Missouri Court of Appeals held that the constitutional issue had not been raised as required by Missouri State practice, the Court stated,

> "To raise and preserve a federal or state constitutional question for appellate review, it must be raised at the first available opportunity. State v. Tatum, 653 S.W.2d 241, 243 (Mo. App. 1983); Kansas City v. Howe, 416 S.W.2d 683, 686 (Mo. App. 1967). It is obvious that this contention could have been raised earlier by a motion directed at the petition and during the trial. As this point was not preserved for review, it is denied. (App. 18).

Upon the dissent of a single Judge of the Missouri Court of Appeals, the case was transferred to the Supreme Court of Missouri on the ground of a conflict

with a prior State decision. The Supreme Court of Missouri, without ruling on the merits of the case, simply retransferred the case back to the Missouri Court of Appeals on the ground,

> "The opinion of the Court of Appeals is not contrary to any previous decision of another appellate court of this State and we are not obliged to retain this cause." (App. 5)

Neither the Missouri Court of Appeals nor the Supreme Court ruled on the constitutional issue attempted to be raised by the petitioner. This case is very similar to Hartford L. Ins. Co. v. Johnson, 249 US 490, 39 S Ct 336, 63 L Ed 722, in which this Court declined to review a federal question because it was not properly raised and ruled on in the trial court as required by the loan standing Missouri practice. In construing the statute this Court stated,

> "It is the settled law that this provision means that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice . . . and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal right."

As the Opinion of the Missouri Court of Appeals indicates, the Federal claim was not asserted as required by Missouri's long standing practice. See also, Layton v. Missouri, 187 US 356, 23 S Ct 137, 47 L Ed 214, holding that a claimed violation of the Federal Constitution is not reviewable in this Court where the Missouri State Court declined to pass on the Federal question because it was not raised in the trial court as required by State practice. This case is entirely different than Harlin v. Missouri, 439 US 459, 99 S Ct 709, 58 L Ed 2d 733, in which the Missouri Supreme Court reviewed the constitutional issue under Missouri's, "plain error" rule. In this case, neither the Missouri Court of Appeals nor the Missouri Supreme Court ruled on the Federal claim being asserted by petitioner. The rule that the State's highest Court must pass upon the Federal question before this Court has jurisdiction to review it was recently applied in Exxon Corp. v. Eagerton, US 103 S Ct 76 L Ed 2d 497 (1983)

ARGUMENT

II

THE COMMON LAW ACTIONS FOR SEDUCTION IS NOT UNCONSTITUTIONAL GENDER BASED CLASSIFICATION.

Petitioner's argument proceeds on the assumption that only women may maintain actions for seduction. While the elements of the action of seduction make it more susceptible to use by women, Petitioner has cited no Missouri case which denies a man the right to maintain such an action. If a man can prove, and, indeed, a jury believe, that he surrendered his chastity to a woman through false promises, artifices, and deceit and was damaged, then we are confident that the common-law of Missouri would allow him to recover. If Petitioner had been defrauded and surrendered his chastity to Respondent through her artifices, false promises and fraud resulting in damage, then he could and should have filed a counterclaim.

Even assuming there is a common-law rule which prohibits a man from maintaining this action, such distinction is not unconstitutional sex classification for the reason that Missouri has a legitimate and compelling interest in ensuring that chaste

females do not surrender their chastity to aggressive men who use false promises, artifices and fraud to seduce their victims and risk subsequent pregnancy. There is an obvious difference between the consequences of sexual intercourse on men and women. Even in our modern society there are still important social values associated with chastity and the prevention of illegitimate births resulting from the fraud, artifices and false promises by men. It is the woman who bears the burden of child bearing resulting from the sexual act, not the man. There is little, if any, burden or adverse effects suffered by a man after an act of sexual intercourse, nor is the concept of male chastity as important as female chastity.

There is an obvious valid and rationale basis and legitimate state concern in requiring fathers to support illegitimate children and seducers, who use false promises, artifices and fraud in order to accomplish their sexual gratifications with chaste women, to be held legally accountable. Hopefully, we have not reached the point where states must allow chaste women to be fair game for unscrupulous

men who use their position, lies and misrepresentations in order to satisfy their lust without any legal responsibility for their misconduct.

Gender based classifications are constitutional if they realistically reflect that the sexes are not always similarly situated. As this Court said in Michael M. v. Sonoma County Superior Court, 450 US 464, 67 L Ed 2d 437, 101 S Ct 1200,

> " * * * this Court has consistently upheld statutes where the gender classification is not individious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances * * *."

This Court then upheld as constitutional a statute making it a crime to have sexual intercourse with a female under the age of 18 years of age and denied the challenge that the statute was gender based classification in that only men could be criminally liable under the statute. The opinion recognizes, "a gender based classification will be upheld if it bears a, ' * * * fair and substantial relationship' to legitimate state ends * * *".

See also Califano v. Webster, 430 US 313, 51 L Ed 2d 360, 97 S Ct 1192, upholding the constitutionality of the Social Security Act granting women reaching the age of 62 greater benefits than men of the same age having the same earning record.

Seduction is an ancient common-law action and is not based upon any statute granting only a right of action to women and prohibiting an action by men. Our research discloses no case in which an attack based on sex discrimination has been leveled against this ancient common-law action. There is no constitutional basis for Petitioner's claim.

Respectfully submitted,

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